



Date: February 13, 1998
Case No. 97-INA-185

In the Matter of:

ANITA SNIDERMAN,
Employer,

on behalf of

ALBA LUCIA GARCIA,
Alien.

Before: Burke, Guill and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification.¹ Employer is a private household seeking to fill the position of "Cook, Domestic." The job requirements Employer listed for this position are two years of experience in the job offered, "or 4,160 hours of paid cooking experience, including general domestic work, wherever or however gained." (AF 21)

In a Notice of Findings dated April 29, 1996, the CO proposed to deny certification, *inter alia*, on the ground that the Alien did not have the required experience or training prior to her employment with this employer in violation of 20 C.F.R. § 656.21(b)(5). (AF 35-39) Employer's argument on rebuttal was:

First of all, we did not conciously [sic] "train" Alba Lucia Garcia for a position as Cook. We hired her originally, way back in June 1986, to work 20 hours per week for us as a

¹ The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. 656.27(C).

Houseworker, General, which was to include 10 hours of cooking. Over the years she has accumulated well over 4000 hours of cooking experience.

What we are offering her now is full-time work as a Cook. We have never hired a cook with less than the experience we are requiring in our Part A forms, but the option of two years (4160 hours) of "cooking experience, including general domestic work, wherever or however gained," is clearly a different and lower requirement than two years as a Cook, Domestic, which would generally involve a higher level of cooking.

(AF 70).

The CO issued a Final Determination on July 26, 1996, denying certification on the ground, *inter alia*, that Employer had not documented that Alien clearly had the qualification of a Domestic Cook prior to hire. (AF 71-73) In its brief, Employer concedes that Alien's experience was gained with the present employer, but in a different occupation.

Under the first prong of § 656.21(b)(6), an employer may not require U.S. applicants to have the same type of experience that the alien acquired only while working for the employer in the same job. *Central Harlem Group, Inc.*, 89-INA-284 (May 14, 1991); *Apartment Management Co.*, 88-INA-215 (Feb. 2, 1989). § 656.21(b)(6) only proscribes training or experience in jobs "similar" to the job for which labor certification is sought. An employer, therefore, may argue that the alien gained his qualifying experience while working in a "lesser" job. To prevail, an employer must show that the "lesser" job is "sufficiently dissimilar" to the job offered. *Brent-Wood Products, Inc.*, 88-INA-259 (Feb. 28, 1989) (*en banc*).

The factors to consider when determining whether jobs are sufficiently dissimilar include, but are not limited to:

- the relative job duties, supervisory responsibilities and job requirements of the positions;
- the positions of the jobs within the employer's hierarchy;
- the employer's prior employment practices;
- whether and by whom the "higher" position has been filled previously;
- whether the "higher" position is newly created;
- the percentage of time spent performing each job duty in each job; and
- the respective salaries or wages.

Delitizer Corp. of Newton, 88-INA-482 (May 9, 1990) (*en banc*).

Here, according to Employer, Alien was previously working as a general houseworker for 20 hours per week, with 10 of those hours involving cooking (AF 7, 70). Neither job appears to have any supervisory responsibilities. The only difference in the job duties revealed by the record is that the general houseworker position also involved cleaning, laundry and child care. The only job requirement for the cook position is experience.

The employer's hierarchy would not appear to admit of much more than minor differences between a part-time general houseworker who spent one-half of her time cooking, and a full-time cook.

Employer states that she had never hired a cook with less than the experience required in the application. (AF 70) This statement directly conflicts with the fact that she hired the Alien without the experience to do 10 hours of cooking per week. In addition, the record contains no information about how often, if ever, Employer previously hired a cook.

The "higher" position appears to have been newly created to offer Alien full-time work as a cook. Alien's purportedly qualifying cooking experience occupied one-half of her on-duty time in the same household in which the full-time cook position will be. Alien's part-time pay was \$150 per week (for 20 hours). The full-time cook position will pay \$332.50 per week (for forty hours).

Based on the above, we conclude that there are only minor differences between the job with Employer with which Alien gained her qualifying experience and the job now being offered. Employer has not established that the jobs are sufficiently dissimilar to remove the proscription of 20 C.F.R. § 656.21(b)(6). Moreover, Employer did not attempt to argue that it is now not feasible to provide the same training for a U.S. worker.

Accordingly, the CO's denial of alien labor certification is AFFIRMED.

Entered at the Direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges**

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.